(6)

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-5375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHRISTOPHER A. BURGER,

Petitioner,

v.

RALPH KEMP, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

---

BRIEF FOR PETITIONER

JOSEPH M. NURSEY*
MILLARD C. FARMER
P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

JOHN H. BLUME, III
P.O. Box 608
Charleston, SC 29402
Counsel for Petitioner

**Counsel of Record*

PRESS OF BAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

48 pp

QUESTIONS PRESENTED

I. (A) Whether, in this capital case, Petitioner was denied the right to the conflict free and effective assistance of counsel under circumstances where his court appointed trial counsel represented Petitioner as well as a co-indictee with inherently adverse interests?

(B) Whether, in this capital case, Petitioner was denied the right to the effective assistance of counsel due to trial counsel's failure to investigate and present available mitigating evidence that if presented to the sentencing jury would have resulted in a reasonable probability of a sentence of life imprisonment as opposed to the death penalty?

II. Whether, in this capital case, the trial court's jury instruction on malice and intent, an instruction in all material respects identical to the one found constitutionally deficient in *Francis* v. *Franklin*, was harmless beyond a reasonable doubt despite substantial record evidence that at the time of the offense Petitioner was intoxicated and was acting under the direction and domination of his co-indictee?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
CITATION TO OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. IN THIS CAPITAL CASE, PETITIONER WAS DENIED THE RIGHT TO CONFLICT FREE AND EFFECTIVE ASSISTANCE OF COUNSEL	12
A. Petitioner's Counsel Had An Actual Conflict of Interest Because He Actively Participated In The Defense Of A Co-Indictee	12
B. Counsel's Failure To Make Any Investigation Or To Present Any Mitigating Evidence, Despite The Fact That Substantial And Compelling Evidence Was Available Undermines Confidence In Petitioner's Sentence Of Death	24
II. THIS COURT'S DECISIONS IN *FRANCIS* V. *FRANKLIN*, AND *ROSE* V. *CLARK*, REQUIRE THAT PETITIONER RECEIVE A NEW TRIAL.	35
CONCLUSION	41

TABLE OF AUTHORITIES

Page

Anders v. *California*, 386 U.S. 738 (1967) 24
Argersinger v. *Hamlin*, 407 U.S. 25 (1972) 25
Baty v. *Balkcom*, 661 F.2d 391 (5th Cir. 1981) 15
Burger v. *State*, 242 Ga. 28, 247 S.E.2d 834 (1978) . 9, 14, 24
Burger v. *State*, 245 Ga. 458, 265 S.E.2d 796, *cert. denied*, 448 U.S. 913 (1980) 9
Burger v. *Zant*, 513 F.Supp. 772 (S.D.Ga. 1981), *rev'd in part, aff'd in part*, 718 F.2d 979 (11th Cir. 1983), *vacated and remanded*, ___, U.S. ___, 104 S.Ct. 2052 (1984), *on remand, sub. nom. Burger* v. *Kemp*, 753 F.2d 930 (11th Cir.), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 41 (1985), *on remand*, 785 F.2d 890 (11th Cir. 41 (1985), *r'hrng denied*, 796 F.2d 1313 (1986) ..... *passim*
Caldwell v. *Mississippi*, ___ U.S. ___, 105 S.Ct. 2633 (1985) 27-28, 34
Camera v. *Fogg*, 658 F.2d 80 (2nd Cir. 1981) 6
Chapman v. *California*, 386 U.S. 18 (1967) 38, 41
Connecticut v. *Johnson*, 460 U.S. 73 (1983) 38
Cuyler v. *Sullivan*, 446 U.S. 335 (1980) 19, 22, 23
Darden v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2464 (1986) 26
Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 20, 28, 33, 34
Fleming v. *State*, 246 Ga. 90, 270 S.E.2d 185 (1980) 16, 18, 23
Foxworth v. *Wainwright*, 516 F.2d 1072 (5th Cir. 1975) .. 22
Francis v. *Franklin*, 472 U.S. ___, 105 S.Ct. 1965 (1985) 35, 36, 38
Gendron v. *State Bar of California*, 35 Cal.3d 409, 673 P.2d 260 (1983) 18
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 25
Gregg v. *Georgia*, 428 U.S. 153 (1976) 17
Hall v. *State*, 241 Ga. 252, 244 S.E.2d 833 (1978) 17
Holloway v. *Arkansas*, 435 U.S. 475 (1978) 18, 20, 23
Jurek v. *Texas*, 428 U.S. 262 (1976) 27
Kimmelman v. *Morrison*, ___ U.S. ___, 106 S.Ct. 2574 (1986) 26, 27
Lockett v. *Ohio*, 438 U.S. 586 (1978) 27, 28
People v. *Chacon*, 69 Cal.2d 765, 447 P.2d 106, 73 Cal. Rptr. 10 (1968) 19
People v. *Sanders*, 221 N.W.2d 243 (Mich. 1974) 22

Table of Authorities Continued

	Page
Pope v. *State*, 256 Ga. 196, 345 S.E.2d 831 (1986)	40
Rose v. *Clark*, ___ U.S. ___, 106 S.Ct. 3101 (1986)	38
Ross v. *Heyne*, 638 F.2d 979 (7th Cir. 1980)	20
Skipper v. *South Carolina*, ___ U.S. ___, 106 S.Ct. 1669 (1986)	28
Stevens v. *State*, 242 Ga. 34, 247 S.E.2d 838 (1978)	14
Strickland v. *Washington*, 446 U.S. 668 (1984)	18, 19, 25, 26, 28, 33, 35
Thomas v. *Kemp*, 766 F.2d 452 (11th Cir. 1985), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 3325, *on remand*, 800 F.2d 1024 (1986)	40
Turner v. *Murray*, ___ U.S. ___, 106 S.Ct. 1683 (1986)	27, 34
United States v. *Ash*, 413 U.S. 300 (1973)	25
United States v. *Cronic*, 466 U.S. 648 (1984)	25, 29
United States v. *Donahue*, 560 F.2d 1039 (1st Cir. 1977)	20
United States v. *Flannagan*, 679 F.2d 1072 (3rd. Cir. 1982)	20
United States v. *Mandell*, 525 F.2d 671 (7th Cir. 1975)	21
Wood v. *Georgia*, 450 U.S. 261 (1981)	13, 18
Woodson v. *North Carolina*, 428 U.S. 280 (1976)	25, 28
Zuck v. *Alabama*, 588 F.2d 436 (5th Cir. 1979)	20
CONSTITUTIONAL AMENDMENTS	
Sixth Amendment to the Constitution of the United States	1, 10, 18, 21, 25
Eighth Amendment to the Constitution of the United States	2, 19, 28
Fourteenth Amendment to the Constitution of the United States	2
FEDERAL STATUTORY PROVISIONS	
28 U.S.C. § 1254 (1)	1
FEDERAL RULES	
Federal Rule of Criminal Procedure 44(c)	20, 22
STATE STATUTORY PROVISIONS	
Ga. Code Ann. § 26-1101(a); O.C.G.A. § 16-5-1(a)	2, 35
Ga. Code Ann. § 27-2503; O.C.G.A. § 17-10-2	2, 31
Ga. Code Ann. § 27-2537; O.C.G.A. § 17-10-35	2, 17

Table of Authorities Continued

Page

OTHER AUTHORITY

ABA Code of Professional Responsibility..... 20, 21

ABA Model Rules of Professional Conduct (1983) 18

ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, § 4-3.5. 15, 18, 20, 27

Note, *Conflicts of Interest in the Representation of Multiple Criminal Defendants: Clarifying Cuyler* v. *Sullivan* 70 Georgetown L.J. 1527 (1982)..... 22

Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv.L.Rev. 1244 (1981) 15

Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn.L.Rev. 119 (1978) 16

Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L.Rev. 299 (1983)..... 32

Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va.L.Rev. 939 (1978)..... 18

White, *The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment, (forthcoming Spring 1987)* 16

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Burger* v. *Kemp*, 785 F.2d 890 (11th Cir. 1986) and is reproduced in the Joint Appendix [J.A.] at 194. The *per curiam* order denying rehearing is reported as *Burger* v. *Kemp*, 796 F.2d 1313 (11th Cir. 1986), and is reproduced at J.A. 206. The previous opinions of the United States Court of Appeals for the Eleventh Circuit in this case are reported as *Burger* v. *Zant*, 718 F.2d 979 (11th Cir. 1983), *vacated and remanded*, ___ U.S. ___, 104 S.Ct. 2052 (1984) (reproduced at J.A. 130) and *Burger* v. *Kemp*, 753 F.2d 930 (11th Cir.), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 41 (1985) (reproduced at J.A. 159).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 13, 1986. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by that court on July 23, 1986. The Petition for a Writ of Certiorari was filed on August 30, 1986, and was granted on November 3, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law . . .

It further Ga. Code Ann. § 27-2537; O.C.G.A. § 17-10-35, which provides, in pertinent part:

> (a) Whenever the death penalty is imposed, upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. . . ."
>
> * * *
>
> (c) With regard to the sentence, the court shall determine:
>
> * * *
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Ga. Code Ann. § 26-1101(a); O.C.G.A. § 16-5-1(a) which provides:

> A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

Ga. Code Ann. § 27-2503(a) & (c); O.C.G.A. § 17-10-2(a) & (c) which provide:

> (a) Except in cases in which the death penalty may be imposed, upon the return of a verdict of "guilty" by

the jury in any felony case, the judge shall dismiss the jury and shall conduct a presentence hearing at which the only issue shall be the determination of punishment to be imposed. In the hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas, provided that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. The judge shall also hear argument by the defendant or his counsel and the district attorney, as provided by law, regarding the punishment to be imposed. The district attorney shall open and the defendant or his counsel shall conclude the argument. Upon the conclusion of the evidence and arguments, the judge shall impose the sentence or shall recess the trial for the purpose of taking the sentence to be imposed under advisement. The judge shall fix a sentence within the limits prescribed by law.

* * *

(c) In all cases tried by a jury in which the death penalty may be imposed, upon a return of a verdict of "guilty" by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. The hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided for in subsection (a) of this code section. Upon the conclusion of the evidence and arguments; the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in Code Section 17-10-30, exist and whether to recommend mercy for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law.

STATEMENT OF THE CASE

During the evening of September 5, 1977, seventeen (17) year old Christopher Burger and his co-indictee, Thomas Stevens, both privates in the Army stationed at Ft. Stewart, Georgia, were drinking heavily. The two consumed approximately four or five pitchers of beer at a local club. Tr. 71.[1] After they ran out of money, Stevens told Petitioner they could obtain more money by robbing a taxicab driver. Stevens then obtained a knife and knife sharpener to accomplish the robbery.

They called a taxi which, when it arrived, was driven by Roger Honeycutt. Honeycutt was threatened with the weapons and robbed by Stevens. At Stevens' direction, Christopher Burger drove the taxi, Stevens and Honeycutt were in the back seat. After Stevens forced Honeycutt to undress, Stevens sexually assaulted him. Afterwards, Stevens locked Roger Honeycutt in the trunk of the taxi.

Burger and Stevens then drove to the Savannah, Georgia airport to pick up James Botsford, an acquaintance of theirs. Botsford testified that during the drive, Stevens informed him in great detail of the circumstances of the robbery and that Honeycutt was still in the trunk of the car. Burger said very little and according to Botsford was essentially doing as Stevens directed. Tr. 112-13.

---

[1] References to the transcript of Petitioner's first trial where the issue of guilt/innocence was decided are referenced in this brief as "Tr."; references to Petitioner's second trial where the sentence of death was again imposed are referenced "R. Tr."; references to the evidentiary hearing held in the federal habeas corpus proceedings in the United States District Court for the Southern District of Georgia are referenced as "FHT."

Stevens suggested that he would kill Honeycutt. Burger was opposed to doing so. Botsford then indicated that if they would release Honeycutt he (Botsford) would not tell anyone about the incident. Burger again stated that Honeycutt should be released. Botsford testified as follows:

> Q. [By the District Attorney] What did you say, if anything, about the man in the trunk?
>
> A. [By Botsford]: I asked them what they intended to do with him.
>
> Q. All right. What response, if any, did you get?
>
> A. Well, Tom Stevens said that he thought they should kill him. And, I told him I thought he was crazy. And, Burger didn't like the idea of killing him either. Burger said that they ought to let him go, that they ought to drive off in the woods somewhere and let him out, and then take the car somewhere and put it like, I think somebody mentioned the ocean. They said they wanted to go to maybe Jacksonville or Savannah, and maybe run the car off a pier. R. Tr. 112-113.

After Botsford was dropped off at Fort Stewart, Stevens directed Burger to drive the taxi to a pond in rural Wayne County, Georgia, a few miles from Fort Stewart. Stevens later ordered Petitioner to drive the taxi into the pond. He acquiesced. After doing so, Burger started to leave, Stevens told him he could not leave, "because we have to make sure—want to make sure the car goes down, with the man in the trunk." Stevens then disposed of the remaining physical evidence.

Petitioner was subsequently arrested and charged with murder. Alvin Leaphart was appointed to represent Burger at his first capital murder trial, at the second sentencing trial and twice on direct appeal to the Supreme Court

of Georgia. Mr. Leaphart's law partner in a two-partner law firm, Robert Smith, was appointed to represent Burger's co-indictee, Thomas Stevens. FHT 13; J.A. at 30-31.

However, in fact both attorneys represented both co-indictees.[2] Both Leaphart and Smith conducted attorney-client conferences with both Stevens and Burger. Leaphart assisted Smith in the preparation of Stevens' case and Smith did likewise. FHT 15, 18; J.A. at 32, 35. The two discussed the issues involved in each case and shared their work product. FHT 18; J.A. 35. The joint counsel approach used by Leaphart and Smith was not only done privately; Smith sat with Leaphart and served as co-counsel at trial. Both Burger's and Steven's cases were tried, on conflicting theories of defense, in the small, tightly knit community of Wayne County, Georgia. There was widespread public knowledge of the case and the court proceedings in the county. FHT 42-43; J.A. at 55-56.

Leaphart perceived the primary issues at trial to be Burger's intent and lesser culpability. The evidence regarding Petitioner's lesser culpability was substantial. At the time of the offense, Burger was seventeen; Stevens was twenty. Stevens was the leader in their relationship; Burger the follower. Stevens planned and initiated the robbery. He was the one who actually took the victim's money. Furthermore, Stevens alone sexually assaulted the victim. He tied the victim up and forced him into the trunk of the vehicle. Stevens told Burger they would have to kill Honeycutt, Burger resisted. Stevens ordered Burger to drive the cab into the pond. In short, the essence of

---

[2] Burger was never informed of the conflict of interest caused by the dual representation. A defendant of course on his own can not be expected to understand the dangers and disadvantages of multiple representation. *See Camera* v. *Fogg*, 658 F.2d 80, 89 (2nd Cir. 1981).

Burger's defense was that he was less culpable than Stevens.

This conflict, caused by the joint representation, adversely affected Leaphart's performance. He refrained from taking actions on Burger's behalf that would have been detrimental to Stevens. Significant was that Leaphart never offered Burger's testimony against Stevens in exchange for a sentence less than the death penalty. FHT 38-39, 65; J.A. at 52, 74-75. At the federal habeas hearing, Leaphart testified that he had never discussed this possibility with the prosecution. FHT 38-39; J.A. at 52. When further questioned, Leaphart testified that he had engaged in plea negotiations, but that "during the first trial [the district attorney] refused to discuss it in any terms." FHT 65; J.A. at 74-75. Therefore, although plea negotiations were entered into in this case, Leaphart never offered his most valuable bargaining chip, Burger's testimony.

Additionally, Leaphart prepared the brief for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. In Petitioner's brief, Leaphart did not argue that Burger was the less culpable party, although the Georgia death penalty statute requires the Georgia Supreme Court to perform comparative proportionality review.

No mitigating evidence was presented by Leaphart at the penalty phase of either of Petitioner's trials. Counsel persisted in this approach despite the fact that Burger was sentenced to die at the first trial. However, substantial mitigating evidence was readily available. The uncontradicted record evidence indicates that at the time of the offense, Petitioner was only seventeen years old. He had an I.Q. of 82 and functioned at the level of approximately a

twelve year old. Tr. 244, 247-48. There was evidence of brain damage in all likelihood caused by blows to Burger's head when he was a child. *Id.*[3] Petitioner had absolutely no prior criminal record. His total prior involvement with the law was that he had been previously adjudicated to be a runaway.

The available, yet unused, evidence regarding Petitioner's upbringing demonstrated that Burger's parents had been married when his mother was fourteen and his father was sixteen. FHT 81; J.A. at 88. His parents divorced when he was a small child. Neither parent wanted Christopher and his childhood was spent being sent from one home where he was unwanted to another. His father would throw him out of his house; his mother would then send him back to live with his father. FHT 84; J.A. at 91.

Petitioner's mother subsequently remarried. His new stepfather beat him and beat Burger's mother in his presence. His stepfather involved him in drugs and alcohol when he was only eleven years old. FHT 84-85; J.A. at 91-92.

The following incident provides a powerful example of the physical and emotional abuse which Petitioner suffered. Burger's mother and stepfather moved from Indiana to Florida. Petitioner was sent to live with his natural father, who beat him and refused to have anything to do with him. He ran away and hitchiked to Florida to live with his mother. He was forced to sell his shoes to buy food along the way. When Petitioner arrived barefoot, his stepfather would not allow him to stay. His mother con-

---

[3] This evidence of Christopher Burger's low I.Q. and brain damage was never presented to the jury at either trial; it was presented only at a motion to suppress hearing at the first trial.

tacted juvenile authorities and informed them that she didn't want Burger and to send him back to his father in Indiana. When Burger arrived in Indiana, his father locked him out of the house. FHT 85-86; J.A. at 92-9.3 Burger was taken in by a neighhbor, as he had nowhere else to go.

Due to his mental limitations, as well as this turbulent family history, Petitioner had no sense of self worth and desparately sought acceptance, from whomever and wherever it was available. FHT 84-85; J.A. at 91-92. He was the perfect candidate to fall under the domination of a man like Stevens.

None of this evidence, however, was presented to either jury that sentenced him to die. Leaphart had no knowledge of most of this evidence, even though the record reveals that it was easily discoverable. For a further exposition of the facts, *see* the dissenting opinions of Circuit Judge Johnson, 718 F.2d at 987-994; 753 F.2d at 942-48; 785 F.2d at 892-95; J.A. at 145-158; 182-193; 199-205.

This is the third time that this case has been before this Court. On two previous occasions this Court vacated the decision of a divided panel of the Eleventh Circuit which denied habeas corpus relief. *Burger* v. *Zant*, 718 F.2d 979 (11th Cir. 1983),[4] vacated and remanded, ____ U.S. ____,

---

[4] Petitioner was convicted and sentenced to death on January 25, 1978. On his initial direct appeal to the Supreme Court of Georgia, the conviction was affirmed, but the death sentence was vacated and the case remanded for retrial solely on the issue of penalty. *Burger* v. *State*, 242 Ga. 28, 247 S.E.2d 834 (1978). At the second sentencing trial, Petitioner was again sentenced to death; the sentence was affirmed by the Supreme Court of Georgia. *Burger* v. *State*, 245 Ga. 458, 265 S.E.2d 796 *cert. denied*, 448 U.S. 913 (1980). After State

104 S.Ct. 2052 (1984); *Burger* v. *Kemp*, 753 F.2d 930 (1985), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 41 (1985). On remand, the same panel of the Eleventh Circuit, still divided, again denied relief. *Burger* v. *Kemp*, 785 F.2d 890 (11th Cir.), *rehearing denied*, 796 F.2d 1313 (1986). This Court granted certiorari on November 3, 1986.

SUMMARY OF ARGUMENT

This capital case involves several questions easily resolved in Petitioner's favor by a straightforward examination of the uncontradicted record evidence in light of this Court's established legal principles.

Petitioner's trial counsel labored under a pervasive conflict of interest. Burger's counsel and his partner in a two partner law firm were appointed to represent both Petitioner and his co-indictee, Thomas Stevens. The two attorneys were actively involved in the representation of both Petitioner and Stevens. The confessions of the two defendants placed primary blame on the other. However, the overwhelming evidence was that Stevens was the far more culpable party. Despite the difference in culpability, counsel never offered Petitioner's testimony in exchange for a sentence of less than death and took other actions adverse to Burger's interests. This constituted an actual conflict of interest and requires that Petitioner receive a

---

post-conviction remedies were exhausted, the United States District Court for the Southern District of Georgia granted habeas corpus relief—on an unrelated issue—only on the issue of sentence. Relief was denied on all other grounds. *Burger* v. *Zant*, 513 F.Supp. 772 (S.D.Ga. 1981). Both sides appealed. The divided panel of the Eleventh Circuit reversed the district court's grant of habeas corpus relief and affirmed the district court in all other respects, effectively reinstating Petitioner's sentence of death.

new trial where he is afforded his Sixth Amendment right to conflict free representation.

At the time of the crime for which he ultimately twice received the death penalty, Christopher Burger was seventeen years old and had no prior criminal record. Due to a very low I.Q. and likely brain damage he functioned at the approximate mental level of a twelve year old. He had a deprived and turbulent childhood where he was both physically and emotionally abused and shuttled back and forth between parents who wanted nothing to do with him. He was introduced to drugs at the age of eleven by a stepfather who also beat him. None of this evidence, however, was presented to either jury that sentenced him to die. Most of this evidence was easily discoverable although unknown to trial counsel. He did absolutely no investigation for the penalty phase of Petitioner's bifurcated trial, preferring instead for reasons either unreasonable or incorrect as a matter of fact and law to rely solely on arguing to the jury Petitioner's lesser culpability in the murder. He pesisted in this approach after Petitioner's first death sentence was reversed by the Georgia Supreme Court. Again after counsel presented no evidence at the penalty phase of Petitioner's second trial, Burger was sentenced to die. This conduct was not only far outside the wide range of competent assistance in a capital sentencing proceeding, but if not for counsel's unprofessional conduct there is a substantial likelihood that the result of the proceeding would have been different, i.e., Petitioner would have received a sentence of life imprisonment rather than the death penalty.

The malice charge given at the guilt/innocence phase of Petitioner's trial was in all material respects indistinguishable from the charge found constitutionally deficient in *Francis* v. *Franklin*. Furthermore, under the

circumstances of this case the error was not harmless beyond a reasonable doubt. The evidence at Petitioner's trial indicated not only that he was extremely intoxicated at the time of the offense but that he was acting under the domination of Stevens. Because the jury could have relied upon the presumption contained in the court's charge to find malice, the error could not have been harmless error pursuant to this Court's holding in *Rose* v. *Clark*.

ARGUMENT

I. IN THIS CAPITAL CASE, PETITIONER WAS DENIED THE RIGHT TO CONFLICT FREE AND EFFECTIVE ASSISTANCE OF COUNSEL.

A. Petitioner's Counsel Had An Actual Conflict Of Interest Because He Actively Participated In The Defense Of A Co-Indictee.

1. The nature of the actual conflict

Alvin Leaphart was appointed by the court to represent Petitioner at his capital murder trial.[5] His appointment continued throughout Burger's second sentencing trial and two direct appeals to the Supreme Court of Georgia. Mr. Leaphart's law partner in a two-partner law firm, Robert Smith, was court appointed to represent Burger's co-indictee, Thomas Stevens. FHT 13; J.A. at 31. Despite the fact that Leaphart and Smith were appointed, each attorney received a substantial fee, approximately nine thousand dollars ($9,000.00) each for a total of eighteen thousand dollars ($18,000.00). Leaphart admitted

---

[5] Leaphart never graduated from college. He went to Ogelthorpe University for a year and Florida State University for a year. He received his law degree from an unaccredited law school, Atlanta Law School. FHT 54; J.A. at 65.

that this was the largest fee he had ever received in a criminal case. FHT 29; J.A. at 44.[6]

Both attorneys worked together to represent the two defendants. Leaphart conducted attorney-client conferences with both Stevens and Burger. He assisted Smith in the preparation of Stevens' case and Smith likewise assisted Leaphart in the preparation of Petitioner's case. FHT 15, 18; J.A. at 32, 35. The two partners discussed the issues involved in each case and shared work product. FHT 18; J.A. at 35. Smith sat with and assisted Leaphart at Petitioner's trial. Leaphart prepared the briefs for both Stevens and Burger on the second appeal to the Supreme Court of Georgia. FHT 40-41; J.A. at 54.

The primary issues at trial, as perceived by Leaphart were whether Burger had the requisite intent and whether he was less culpable vis-a-vis his co-indictee, Stevens. There was considerable evidence presented regarding Burger's lack of intent, i.e., evidence of intoxication, duress and unwillingness to kill the victim. The evidence of lesser culpability was overwhelming. At the time of the crime, Burger was seventeen; Stevens was twenty. Stevens was the leader; Burger the follower. Stevens planned and initiated the robbery of the victim; Burger simply followed his instructions. Stevens actually took the money from the victim; Stevens forced Honeycutt to have oral sodomy and anal sodomy with him;

---

[6] The next largest fee he could even remember receiving in a criminal case was twenty-five hundred dollars ($2,500). *Id.* Each of Petitioner's trials took two days, including jury selection, presentation of evidence, argument, jury charge, deliberation and verdict. The fee received by each attorney for representing each client was deposited in the law firms corporate account. FHT 14-15; J.A. 31-32. This Court has recognized that an attorney's financial interest can create a conflict of interest. *See Wood* v. *Georgia*, 450 U.S. 261 (1981).

Stevens tied the victim up and forced him into the trunk of the car. When Stevens told Burger they would have to kill Honeycutt, Burger was strongly opposed to doing so. Stevens then told Burger they would have to get rid of the cab by driving it into the pond and ordered Burger to do so. Stevens was dominant; Burger was submissive.

Leaphart never informed Petitioner of the possibility of a conflict of interest nor did the trial court which appointed Leaphart and Smith, ever inquire into the possibility of a conflict of interest nor did it seek to limit the sharing of representation. FHT 15-16; J.A. at 32. Leaphart testified that he never perceived a conflict despite the fact that his primary defense was Petitioner's lesser culpability, i.e., the defense was to place the lion's share of the blame on Stevens, while Stevens' confession placed responsibility for the murder on Burger. In fact, the two confessions, given before either attorney was appointed, were contradictory on points essential to proof of the elements of the charged offenses. *Compare Burger* v. *State*, 242 Ga. 28, 247 S.E.2d 834 (1978) and *Stevens* v. *State*, 242 Ga. 34, 247 S.E.2d 838 (1978). Stevens' case was tried on the diametrically opposite theory, i.e., that Burger killed Honeycutt over Steven's protests. Leaphart testified at the evidentiary hearing that in the small community where Petitioner's case was tried it was impossible to keep a "secret" regarding the case. FHT 42; J.A. at 55. It was especially difficult to do so in this case where the facts of the crime were widely known. FHT 41; J.A. at 55. Therefore, it necessarily follows that the public, and very possibly members of the jury, knew that the cases were being tried on inherently inconsistent theories. This concern would have been especially relevant at Petitioner's sentencing retrial. Leaphart testified that the newspapers covered the trials extensively (FHT 42; J.A. at 55) and that people were aware, including potential

jurors, of the sentence imposed as well as the evidence presented at the first trials. FHT 42-43; J.A. at 56.[7]

2. The conflict adversely affected counsel's performance.

Under these circumstances, where the two defenses were inherently conflicting, any evidence or arguments made by Leaphart on Burger's behalf would necessarily be damaging to Stevens. The close cooperation of the two partners in this case rendered unfettered advocacy impossible. This conflict adversely impaired Leaphart's performance in a variety of ways. On several occasions, he refrained from taking actions on Burger's behalf that would have been detrimental to Stevens. Most significantly, neither before nor during either trial did Leaphart offer Burger's testimony in exchange for a sentence of life imprisonment.[8] FHT 38-39; J.A. at 52.

---

[7] The jurors' awareness of the evidence and result of the first trial is clear from the voir dire at the second trial. The potential jurors were brought into the courtroom in panels of twelve. When each panel was brought in, Leaphart asked if any juror had any knowledge of the facts or details regarding the crime. Among the first panel of twelve, there were affirmative responses but the record does not reveal how many jurors had any knowledge of the previous events. R. Tr. 22. In the second panel of twelve, nine jurors had at least some knowledge. R. Tr. 34. Among the third panel of twelve, six jurors responded affirmatively. R. Tr. 40. And among the fourth panel, eight of twelve did so. R. Tr. 48.

[8] *See Baty* v. *Balkcom*, 661 F.2d 391, 397 n.12 (5th Cir. 1981) ("[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings."); *see also*, ABA Standards Relating to the Administration of Criminal Justice, The Defense Function § 4-3.5, commentary, p. 4-42 (conflict likely to occur in plea bargaining); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1382 (1981) (recognizing the dangers of plea bargaining in multiple defendant

At the federal habeas hearing, Leaphart testified that he had not, at any time during his represenation of Burger, explored the possibility of Petitioner testifying against Stevens. FHT 38-39; J.A. at 52. When further questioned, Leaphart testified that he had engaged in plea negotiations, but that "during the first trial [the district attorney] refused to discuss it in any terms." FHT 65; J.A. at 74-75. However, he never offered the strongest weapon in his bargaining arsenal, Burger's testimony. Therefore, although some type of a plea negotiation was attempted, counsel never offered Burger's testimony against Stevens.[9]

Additionally, Leaphart prepared the briefs for both Burger and Stevens on each defendant's second appeal to the Supreme Court of Georgia. FHT 40-41; J.A. at 54. Although Leaphart had identified Burger's lesser culpability as the primary defense at trial, he did not argue in Burger's brief that he was substantially less

---

cases); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119 (1978) (plea bargaining in mulitiple defendant cases is fraught with danger). *See also*, *Fleming* v. *State*, 246 Ga. 90, 270 S.E.2d 185, 189 (1980) (Bowles, J., concurring): "[n]o two defendants share equal responsibility for a crime. Usually one is more culpable than the other or for any number of reasons has a greater degree of responsibility for what occurred. One may also be more entitled to leniency based on such factors as age, intelligence, motive, background, previous conduct or record, etc. Common counsel eliminates any practical possibiity of plea bargaining."

[9] Prosecutors take plea bargains in the overwhelming number of potential capital cases for reasons frequently unrelated to the strength of the evidence. *See* White, *The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment*, Chapter 2, Plea Bargaining and the Death Penalty (forthcoming Spring 1987).

culpable than Stevens. This omission is especialy significant because the scope of the Supreme Court of Georgia's appellate review in capital cases includes a consideration of whether the "sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3); O.C.G.A. § 17-10-35(c)(3).[10] There can be no conceivable strategic reason for omitting such a crucial issue from the brief, except for one; to have done so would have cast Stevens in an extremely unfavorable light. Leaphart's divided loyalties are manifest in the brief he filed on Burger's behalf.

A situation more conducive to divided loyalties than the situation in this case can hardly be imagined. Faced with the inherent conflict between Burger's and Stevens' defenses, it was impossible for Leaphart to fully and vigorously represent Petitioner at the same time that he was actively involved in representing Stevens.[11] Leaphart perceived a defense based upon Burger's lesser culpability vis-a-vis Stevens. However, it is obvious that

---

[10] In *Gregg* v. *Georgia*, 428 U.S. 153 (1976), this Court placed a great deal of emphasis on the Georgia Supreme Court's review of death sentences in upholding the constitutionality of that particular system. 428 U.S. at 198, 204-06. This Court noted: "[i]n particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Id.* at 206. The Georgia Supreme Court on occasion has exercised its proportionality review and found the death penalty to be disproportionate. *See Hall* v. *State*, 241 Ga. 252, 244 S.E.2d 833 (1978) (less culpable co-indictee's sentence of death held to be disproportionate under the circumstances).

[11] It goes without saying that the presence of Stevens' lead counsel, Mr. Smith, at the defense table during trial would act as a tangible inhibiting influence against zealously advocating Burger's primary defense of lesser culpability.

any action taken by Leaphart on behalf of Christopher Burger would have worked to the extreme disadvantage of Stevens.

3. The conflict in light of this Court's prior decisions.

The most basic duty of counsel is the duty of loyalty. *Strickland* v. *Washington*, 446 U.S. 668, 692 (1984); *see also*, ABA Model Rules of Professional Conduct, comment to Rule 1.7 (1983) ("loyalty is an essential element in the lawyer's relationship to a client"). The jurisprudence of this Court has consistently recognized that where the constitutional right to counsel exists, there is a correlative right to representation that is free from a conflict of interest. *See, e.g., Wood* v. *Georgia*, 450 U.S. 261, 271 (1981). In *Holloway* v. *Arkansas*, 435 U.S. 475, 489-90 (1978), this Court recognized that the Sixth Amendment contemplates that the assistance of counsel will be untrammeled and unimpaired. Therefore, attorneys should not simultaneously represent conflicting interests. *Id.* at 482.[12] Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. Although joint representation of multiple defendants is not *per se* violative of the Sixth Amendment, *Holloway*, 435 U.S. at 482, "a possible conflict of interest inheres in almost every instance of multiple rep-

---

[12] Most jurisdictions appoint separate counsel for all indigent codefendants. *See* Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939 (1978); *see also*, *Fleming* v. *State*, 264 Ga. 90, 270 S.E.2d 185 (1980) (for a more detailed discussion of *Fleming* see *infra*, n.21.) *Gendron* v. *State Bar of California*, 35 Cal.3d 409, 673 P.2d 260 (1983) (jointly charged codefendants entitled to separate and independent counsel); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, § 4-3.5(b), commentary p. 4-41 (normally joint representation should not occur in a criminal case).

resentation." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980).

In this case there was no objection by either Petitioner or Leaphart to the joint representation. Generally under such circumstances, this Court has held that a person challenging his conviction must demonstrate that an actual conflict of interest existed.[13] *Cuyler* v. *Sullivan*, *supra*.

In order to establish the existence of an actual conflict, Petitioner must demonstrate that counsel actively represented conflicting interests. *Id.* at 349. However, if an actual conflict of interest exists, one need not demonstrate prejudice in order to be entitled to relief. *Id.* As this Court recognized in *Holloway*, *supra*, it is difficult if not impossible to assess the impact of an actual conflict of interest. 435 U.S. at 491. *See also*, *Strickland* v. *Washington*, *supra*, 466 U.S. at 692 (reaffirming that where an actual conflict is shown prejudice is presumed).

Conflict free representation, essential in any case, is of paramount importance in a capital case.[14] This Court has

---

[13] However, Petitioner's case is a prime example of the exception noted in *Cuyler*, 446 U.S. at 347. The trial court must initiate an inquiry if "the trial court knows or reasonably should know that a particular conflict exists . . ." *Id.* In this case the trial judge sat at both Burger's and Stevens' first and second trials and heard the motions to suppress the confessions; he knew that the co-indictees had made irreconcilably conflicting confessions. By the end of the suppression hearings and certainly by the end of the first trials, the trial judge reasonably should have known of this serious conflict of interest.

[14] *See People* v. *Chacon*, 69 Cal.2d 765, 775, 447 P.2d 106, 73 Cal. Rptr. 10 (1968). In *Chacon*, Justice Traynor concluded that due to the uniqueness of the sentencing process in a capital case a lawyer cannot represent more than one defendant in a capital trial.

consistently emphasized the importance of consideration of the individual and his characteristics in the sentencing phase of a capital case. *See, e.g., Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982) (the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender as a constitutionally indispensable part of the capital sentencing process.)

Even though Leaphart was not appointed to represent Stevens he was actively involved in his representation. He consulted confidentially with Stevens, aided in preparing his case for trial and prepared the briefs for both of his direct appeals. FHT 13-18; J.A. at 30-35. However, even had Leaphart not been directly involved in the representation of Stevens, which the uncontradicted record evidence indicates that he was, a conflict of interest would have still existed. Representation of co-indictees by two members of the same firm is sufficient to establish a conflict. *See, e.g., United States* v. *Flannagan*, 679 F.2d 1072 (3d Cir. 1982); *Ross* v. *Heyne*, 638 F.2d 979, 983 (7th Cir. 1980); *Zuck* v. *Alabama*, 588 F.2d 436, 438 (5th Cir. 1979); *United States* v. *Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977); Rule 44(c) of the Federal Rules of Criminal Procedure.[15]

---

[15] *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR5-105 (D); ABA Standards Relating to the Administration of Criminal Justice, The Defense Function § 3.5(b):

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or *lawyers who are associated in practice*, should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarly a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and *when the several defendants give an informed consent to such multiple representation*. (emphasis added).

The fault in this case is primarily Leaphart's. He failed to call either to the trial court's or Burger's attention the pervasive conflict of interest.[16] Every published standard of professional ethics condemns the conduct of defense counsel in this case.[17] Ethical Canon 5-15 and Disciplinary Rule 5-105 of the ABA Model Code of Professional Responsibility, the prevailing set of professional norms at the time of Petitioner's trials, are unequivocal that a lawyer should never be involved in the representation of multiple clients with differing interests.[18]

---

[16] *See Holloway* v. *Arkansas*, 435 U.S. at 485-6: ". . . defense attorneys have the obligation, upon discovering a conflict of interest, to advise the court at once of the problem."; *United States* v. *Mandell*, 525 F.2d 671 (7th Cir. 1975) [("We think the Sixth Amendment rights of defendants are adequately safeguarded *by imposing the duty of informing defendants of the potential dangers of multiple-client representation initially on the attorneys*, as officers of the court . . ." *Id.* at 677 (emphasis added)].

[17] The Sixth Amendment and the various canons of professional ethics are interactive. To some extent, Sixth Amendment principles rely on "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland*, 466 U.S. at 688.

[18] ABA Code of Professional Responsibility, Ethical Canon 5-15 states in pertinent part:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubt against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests: and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. . . .

See also, ABA Code of Professional Responsibility, Disciplinary Rule 5-105, which states in pertinent part:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client

However, the trial court is also to blame. The same judge appointed one law firm to represent both Burger and Stevens and failed to inform Petitioner of the inherent conflict. Pursuant to this Court's decisions, if the trial court knows or under the circumstances should know that a particular conflict exists, then the court has an affirmative duty to take action. *Cuyler*, 446 U.S. at 347.[19] A trial court has the responsibility to avoid compromising counsel's ability to represent a client zealously within the bounds of the law by appointing one lawyer to defend two or more parties with inconsistent interests. *Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975).[20]

---

will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under Dr 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

[19] *See Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975) (trial judge has an obligation to anticipate conflicts reasonably foreseeable at the outset of the case when counsel is appointed); *see also*, *People* v. *Sanders*, 221 N.W.2d 243 (Mich. 1974) (existence of an exculpatory statement blaming a co-defendant is one of the most important criteria in determining whether a conflict exists).

[20] The above language from *Foxworth* v. *Wainwright* was noted with approval by this Court in *Cuyler* v. *Sullivan*, 446 U.S. at 347, n.13 (1980) as an exception to the general rule that the trial court is not required to automatically inquire into the circumstances of multiple representation. Fed. R. Crim. P. 44(c) requires the trial court to advise each defendant of his right to separate representation and to take affirmative steps to protect the right to counsel. A majority of states require the trial court to make an affirmative inquiry comparable to F.R. Crim. P. 44(c). Note, *Conflicts of Interest in the Representation of Multiple Criminal Defendants: Clarifying Cuyler* v. *Sullivan*, 70 Georgetown L.J. 1527, 1528 n.7 (1982).

Faced with the previously detailed disparity in the culpabilities of the parties, Leaphart should have offered Christopher Burger's testimony against Stevens to the prosecution in exchange for a life sentence.[21] Unfortunately, Leaphart never even raised this possibility during his representation of Petitioner. FHT 38-39; J.A. at 52. Additionally, there is the problem of how he could have arranged such a plea when his divided loyalties required him to protect Stevens' interests as well.

Although pervasive prejudice to Burger is obvious from the above facts, such a showing is not necessary. A defendant who shows that a "conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Cuyler* v. *Sullivan*, 446 U.S. at 349-50.

As this Court noted in *Holloway* v. *Arkansas*, 435 U.S. at 490:

---

[21] The Supreme Court of Georgia, subsequent to Petitioner's trials, adopted a mandatory rule in death penalty cases that co-defendants must be provided with separate and independent counsel. This rule applies with equal force to representation by a single attorney or by members of the same law firm. *Fleming* v. *State*, 264 Ga. 90, 270 S.E.2d 185, 188 and n.7 (1980). "Such a rule is especially necessary where the death penalty is sought, because in these cases even a slight conflict, irrelevant to guilt or innocence, may be important in the sentencing phase." *Id.* at 188. The logic of this rule, explained by Justice Bowles of the Georgia Supreme Court in his concurring opinion, is particularly relevant in Christopher Burger's case:

> No two defendants share equal responsibility for a crime . . . One may [be] entitled to leniency based on such factors as *age, intelligence, motive, background, previous conduct or record, etc.* Common counsel eliminates any practical possibility of plea bargaining.
>
> *Id.* at 189 (Bowles, J., concurring) (emphasis added).

> ". . . in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial negotiations and in the sentencing process . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. (emphasis in original).

Under the unique circumstances of this case, Petitioner is entitled to a new trial where he will be afforded effective and conflict free assistance of counsel.

B. Counsel's Failure To Make Any Investigation Or To Present Any Mitigating Evidence, Despite The Fact That Substantial And Compelling Evidence Was Available Undermines Confidence In Petitioner's Sentence Of Death.

Leaphart presented absolutely no mitigating evidence at the penalty phase of his bifurcated trial. He did this not once, but twice. Petitioner's first sentence of death was vacated by the Georgia Supreme Court. *Burger* v. *State*, 242 Ga. 28, 274 S.E.2d 834 (1978). Despite the fact that counsel's "strategy" had been given the ultimate test and found wanting he again failed to either investigate or present evidence of mitigating circumstances at the second sentencing trial. Petitioner was again sentenced to death. Leaphart testified at the federal evidentiary hearing that despite the outcome of the first two trials, he would still not present any mitigating evidence if he tried the case a third time; he would simply hope for a different jury. FHT 52; J.A. at 64. This failure to present evidence of mitigating circumstances was not based upon any even marginally reasonable strategy decision, but rather upon a failure to conduct a reasonably adequate investigation.

Our system of criminal justice presumes that counsel will act as an accused's advocate. *Anders* v. *California*,

386 U.S. 738 (1967). This Court has repeatedly emphasized the "fundamental" role of counsel to a fair trial. *See, e.g., United States* v. *Cronic*, 466 U.S. 648 (1984); *Argersinger* v. *Hamlin*, 407 U.S. 25, 31 (1972), *Gideon* v. *Wainwright*, 372 U.S. 335, 343-44 (1963). The theme of this Court's decisions is that counsel is the means through which the other rights of the accused are secured. *Cronic*, 466 U.S. at 653; *see also, United States* v. *Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). Counsel's mere presence, however, is not sufficient to satisfy the constitutional command. *Strickland*, 466 U.S. at 685. Counsel's duty is "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688.

Counsel's role in a capital sentencing proceeding is comparable to counsel's role at trial, i.e., to ensure that the adversarial process works to produce a just result. *Strickland* v. *Washington, supra*. Because the "penalty of death is qualitatively different . . . [t]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976). Therefore, it is the obligation of trial counsel to protect and ensure the reliability of capital sentencing by assuring that a sentence of death is not imposed arbitrarily and/or in spite of factors which call for a less severe sentence.

A Sixth Amendment claim of ineffective assistance of counsel must be resolved by examining the facts of the case in light of the principles enunciated by this Court in *Strickland* v. *Washington, supra*. In *Strickland*, this Court determined that counsel was constitutionally ineffective if counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot

be relied upon as having produced a just result. 466 U.S. at 687. *See Kimmelman* v. *Morrison*, ___ U.S. ___, 106 S.Ct. 2574, 2583 (1986) (essence of an ineffective assistance of counsel claim is that counsel's unprofessional errors render verdict suspect). That test is twofold: was counsel's performance in fact deficient; and, if so, was this prejudicial to the defense.

In order to make the first determination, this Court said that the proper inquiry is whether counsel's performance fell below an objective standard of reasonableness. *Strickland* v. *Washington*, 466 U.S. at 688. In other words, someone challenging the assistance of counsel must show that the particular acts of counsel were outside the "wide range of competent assistance." *Id.*[22]

In order to make the second determination, it must be shown that the acts of counsel that were outside the range of competence were actually prejudicial, i.e., that they had an adverse effect. 466 U.S. at 692. In order to demonstrate actual prejudice, the inquiry is whether there is a "reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different." *Id.* at 694.

Of course, one of an attorney's principal duties is "to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91; *see also*, *Darden* v. *Wainwright*, ___ U.S. ___, 106 S.Ct. 2464 (1986) (counsel not ineffective where he engaged in extensive pre-trial preparation and investigation for the penalty phase of

---

[22] The Court also expressed a presumption in favor of competence that one challenging the effectiveness of counsel must overcome. 466 U.S. at 689.

Darden's trial); *Kimmelman*, *supra*, (failure to investigate suppression claim rendered counsel ineffective).[23] In a capital case, investigation of, preparation for and presentation of the mitigation case at the penalty phase is in many cases a much more critical task than is preparing for the guilt/innocence phase. Guilt is frequently a foregone conclusion. Whether the accused lives or dies, however, is not.

This Court's decisions have stressed that the sentencing body's possession of the fullest information possible concerning the defendant's life and characteristics is highly relevant if not essential to the selection of the appropriate sentence. *Lockett* v. *Ohio*, 438 U.S. 586 (1978), *see also*, *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). The reasoning behind this bedrock Eighth Amendment principle is self-evident. In capital cases, the penalty will frequently turn on counsel's ability to marshall and present mitigating evidence. An individualized decision is essential in capital cases in order that each defendant will be treated "with that degree of respect due the uniqueness of the individual." *Lockett*, 438 U.S. at 605. In a capital sentencing proceeding before a jury, "the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Turner* v. *Murray*, ___ U.S. ___, 106 S.Ct. 1683, 1687 (1986) [quoting *Caldwell* v.

---

[23] *See also*, ABA Standards for Criminal Justice, Standard 4-4.1 (2d. ed. 1980) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.")

Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 2645-6, n.7 (1985)].

It is essential, therefore, that the sentencer consider those "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson* v. *North Caroina*, 428 U.S. at 304. The sentencing body's failure to consider mitigating evidence creates the risk that the death penalty will be imposed in spite of factors which may call for less severe penalty. *Id.; see also, Skipper* v. *North Carolina*, ___ U.S. ___, 106 S.Ct. 1669 (1986) (State's exclusion of evidence regarding adjustment to prison violated Eighth Amendment); *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) (sentencers' failure to consider evidence of teenage defendant's turbulent family history violated Eighth Amendment); *Lockett* v. *Ohio*, *supra*.

If the sentencing authority's inability to consider substantial and persuasive mitigating evidence is due to counsel's failure to present it, though easily acquired, then "counsel's conduct [has] so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

1. The available mitigating evidence.

The available mitigating evidence has been set forth in detail in the Staement of the Case, *supra*. That evidence can be briefly summarized as follows. At the time of the offense Burger, an adolescent with a low I.Q. and likely brain damage functioned at the approximate mental level of a twelve year old. He had no prior criminal record. He was the son of teenage parents who subsequently divorced. His childhood was a horrifyng litany of physical beatings and psychological abuse. He was constantly

shuttled back and forth between parents who wanted nothing to do with him. Petitioner was introduced by a stepfather to drugs and alcohol at the age of eleven. Not one brushstroke of this tragic portrait of the Petitioner and the circumstances of his childhood was presented to either jury that sentenced him. Not even a single mother's tear was introduced to suggest to the jury that his life should be spared.

2. The nature of counsel's investigation and his "reasons" for not presenting evidence.

Leaphart testified at the evidentiary hearing that he elected not to present evidence concerning Petitioner's background because he knew of no witness that would have benefitted Burger at the sentencing trial. FHT 44; J.A. at 57.[24] He came to this conclusion after talking with Petitioner and very briefly with his mother. Leaphart knew that Burger was a mentally impaired adolescent. Tr. 244, 247-48. Petitioner, therefore, could hardly be expected to be conversant with the intricacies of the broad range of admissible evidence at the penalty phase of a bifurcated trial. Furthermore, even giving Leaphart's testimony at the evidentiary hearing a generous interpretation, he spent less than six hours talking with Burger. FHT 37; J.A. at 51. This time period is hardly adequate to investigate and explore Burger's life history as well as to determine the identity of other persons who might provide additional information. No reasonable determination to cease investigation could be made solely on the basis of his inadequate conversations with Petitioner.

---

[24] Leaphart assumed, without the benefit of investigation, that the only mitigation he would be able to find was "something like he was a good boy and went to church." FHT 52; J.A. 63.

Trial counsel's conversation with Christopher Burger's mother, Ms. Betty Foster, was equally inadequate. He never initiated contact with her at all; in face he never informed her that her son was facing a capital murder trial. FHT 36, 75; J.A. at 50, 83. Leaphart spoke with her on only one occasion for approximately half an hour immediately prior to Petitioner's first trial. FHT 76; J.A. at 84. Even then the only inquiry he made was whether Petitioner had ever had any pscyhological examinations. She provided him with the requested information and he never spoke with her about the case again. FHT 76; J.A. at 84. He did not ask about Petitioner's background, the circumstances of his childhood or whether there were any potential mitigation witnesses for the penalty phase of Burger's trial. FHT 75-76; J.A. at 84. Furthermore, he never explained to her, before or during either trial, the nature of the penalty phase proceeding or the type of evidence admissible at such a proceeding. FHT 80; J.A. at 87.

The only other person familiar with Burger with whom Leaphart had contact was an attorney, Richard Halley, who was an acquaintance of Burger's family. FHT 78; J.A. at 85. As with Petitioner's mother, this contact was initiated by Mr. Halley, not defense counsel. When contacted by Ms. Foster, Richard Halley offered to travel to Georgia at his own expense to assist in whatever way he could. FHT 78; J.A. at 86. According to his own testimony, Leaphart refused the offer of assistance because Halley was black.[25]

---

[25] Leaphart's testimony is as follows:

> Well, this particular lawyer was black. And, I felt that his close association with Mrs.—I didn't know what the association was, I'm not trying to imply there was—I felt that would have had in the environment there, would have had an ill effect on Mr. Burger's chances . . .
>
> Q. Purely because he was black?
>
> A. Purely because of the—I guess you would say that. . . . FHT 45; J.A. at 58.

Leaphart further attempted to justify his approach (or lack thereof) on the bases that it was his theory of defense to make the State prove its case, that if mitigating evidence had been offered he would have lost the right to both opening and closing argument, and that he chose to rely in closing argument on the fact that Petitioner had never been in trouble before and that this strategy would have been undercut by an investigation into and testimony concerning Petitioner's background.

Each stated reason is totally and utterly frivolous. His theory not to offer any mitigation evidence in order to preserve his right to opening and closing arguments is not only unreasonable but wrong. Ga. Code Ann. § 27-2503(a) & (c); O.C.G.A. § 17-10-2(a) & (c) which governs the conduct of capital sentencing proceedings in Georgia provides: "[t]he district attorney shall open and the defendant or his counsel shall conclude the argument." The presentation of evidence by the defendant at a capital sentencing proceeding in no way affects this division of argument between the State and the defense. This is in fact the procedure that was utilized at Burger's sentencing proceeding. R. Tr. 234, 250.

Again as to counsel's "strategic" choice to rely in closing argument on the theory that Burger had no prior record of violent crime and had never been in trouble before, the facts are otherwise. At Burger's second sentencing proceeding Leaphart at no point in his closing argument made reference to Burger's lack of a prior record.[26] What Leaphart did stress at the second sentencing proceeding in his closing argument was Burger's comparative lack of culpability and asked for the jury's mercy. It is difficult, if

---

[26] Even had counsel made this argument, the simple fact is that Burger had no prior criminal record. No witness could have contradicted that fact.

not impossible, to perceive, however, how this argument would have been undercut by the presentation of humanizing evidence concerning Petitioner and his background.

Leaphart's failure to investigate and present mitigating evidence reveals that he failed to preceive the nature and purpose of the penalty phase.[27] His testimony at the evidentiary hearing reveals no understanding of strategic considerations involved in such a proceeding, which are significantly different than the considerations involved in the guilt/innocence phase of a bifurcated trial.[28] His failure to comprehend the distinctions resulted in an inadequate adversarial proceeding and undermine confidence in the reliability of this sentence of death.

3. Counsel's failure to investigate, prepare or present available mitigating evidence was both unreasonable and creates a reasonable probability that if the evidence had been presented, the Petitioner would have received a sentence of life imprisonment rather than the death penalty.

As was demonstrated above, counsel's reasons for failing to investigate, prepare or present mitigating evidence are patently unreasonable. The articulated "strategical" reasons for failing to present a mitigation case were incorrect. Petitioner did not gain the ability to present opening and closing arguments by failing to present evidence; even a cursory review of the Georgia death penalty statute would have demonstrated that. Counsel did not in fact argue that Petitioner had never been in trouble before at

---

[27] At the evidentiary hearing Leaphart was not able to indicate the name or holding of any of this Court's decisions regarding capital punishment. FHT 31-32; J.A. at 46-47.

[28] *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L.Rev. 299, 303-05 (1983).

the second sentencing trial. However, had he done so, the available mitigating evidence would have supported rather than undercut this form of advocacy.

The record is uncontradicted, that Burger had absolutely no prior criminal record. His only previous encounter with the law was that he had been adjudicated as a runaway. Finally, it is ludicrous to believe that counsel's decision to argue Burger's lesser culpability would have somehow been compromised by introducing evidence of Petitioner's low I.Q., and turbulent childhood. On the contrary such evidence would have given a factual basis to counsel's argument, i.e., that due to his mental shortcomings and constant rejection, Petitioner had no sense of self worth and would do almost anything to gain acceptance. Leaphart's conduct was clearly outside the "wide range of reasonable professional assistance." *Strickland*, *supra*, 466 U.S. at 689.

Not only was counsel's conduct unreasonable, there is a "reasonable probability that but for [Leaphart's] unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The available mitigating evidence was compelling and because of counsel's failure to present it, the sentencing jury failed to see Petitioner as a human being. As this Court recognized in *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982) this is exactly the type of information critical to a reliable determination of sentence in a capital proceeding involving a teenager.

> "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation [cite omitted.] In some cases such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense, there can be no doubt that evidence of a turbulent family history of beatings by a harsh

> father, and of severe emotional disturbance is particularly relevant.
>
> * * *
>
> . . . just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."

Eddings, 455 U.S. at 115-116.

Due to trial counsel's failure to investigate or present available mitigating evidence the sentencing jury failed to consider Burger's background as a mitigating factor. In both *Eddings* and Petitioner's case, the sentence of death was imposed without consideration by the sentencers of a "particularly relevant" . . . "mitigating factor of great weight." *Eddings*, 455 U.S. at 114-116.

As this Court acknowledged in *Eddings*, the available mitigating evidence in this case is precisely the type of evidence which would warrant a sentence less than the death penalty. The sentencing jury, however, knew nothing of Petitioner's sympathetic and troubled youth and the unusual features of his upbringing that affected his formative development, and, therefore, was forced to make a decision regarding our society's "ultimate penalty" without any evidence as to his background, character and upbringing to enlighten their decision.

Therefore, the jury's "highly subjective, unique, individualized judgment," *Turner* v. *Murray*, *supra*, was skewed because counsel failed to provide the jury with the most relevant information. Due to counsel's errors the sentencing process at Petitioner's trial did not facilitate the reliable exercise of sentencing discretion. *Caldwell* v. *Mississippi*, 105 S.Ct. at 2639. Certainly this evidence

creates "a reasonable probability that absent [counsel's] errors [the jury] . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant [the] death [penalty]." *Strickland* v. *Washington*, 466 U.S. at 695.

II. THIS COURT'S DECISION IN *FRANCIS* v. *FRANKLIN*, AND *ROSE* v. *CLARK*, REQUIRES THAT PETITIONER RECEIVE A NEW TRIAL.

1. The Malice Instruction In Light Of *Francis* v. *Franklin*.

Petitioner was found guilty of malice murder, defined in Georgia as causing the death of another "unlawfully and with malice aforethought, either express or implied." Ga. Code Ann. § 26-1101(a); O.C.G.A. § 16-5-1(a). The trial court's charge regarding malice and intent[29] was as follows:

> *I charge you now the presumptions that are rebuttable.* Every person is presumed to be of sound mind and discretion. *The acts of a person of sound mind and discretion are presumed to be the products of the person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.* A person will not be presumed to act with criminal intention, but the jury may find such intention upon consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which they (sic) accused is prosecuted.
>
> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is

---

[29] Pursuant to Georgia law, malice and intent are essential elements of malice murder. Ga. Code Ann. § 26-1101(a); OCGA §16-5-1(a).

> always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.
>
> Tr. at 410-411; J.A. at 25 (emphasis added).

The constitutional deficiency of the malice instruction given at Petitioner's trial is clearly established by this Court's holding in *Francis* v. *Franklin*, 472 U.S. ____, 105 S.Ct. 1965 (1985). Franklin, a prison escapee, killed a homeowner during an attempt to steal the victim's car. His defense was that he had not intended to kill the victim but rather that the gun had accidentally discharged. The trial court charged the jury regarding intent:

> A crime is a violation of a statute of this State in which there shall be a union or joint operation of act or omission to act, and intention or criminal negligence. A person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking or intention or criminal negligence. *The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the preseumption may be rebutted.* A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. *Francis* v. *Franklin*, 105 S.Ct. at 1969-1970 (Emphasis added).

This Court, after examining the charge as a whole in order to determine whether other parts of the charge

cured the error,[30] concluded that the charge was a mandatory rebuttable presumption that impermissibly relieved the State of its proper burden of proof on the issue of malice. *Id.* at 1972-73.

The same instruction found constitutionally lacking in *Franklin* was given, virtually verbatim, at Christopher Burger's trial.[31] Tr. 410-411. There can be no serious

---

[30] Immediately after the two instructions concerning the presumption of intent, the trial judge had instructed the jury that "[a] person will not be presumed to act with criminal intention . . ." In addition, he had repeatedly stressed that the burden of proof was on the state. Nevertheless, this Court found that the jury might reasonably have interpreted the charge as a whole to mean that "although intent must be proved beyond a reasonable doubt, proof of the firing of the gun and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise." 105 S.Ct. at 1974.

As for the instruction that a person was not to be presumed to act with criminal intent, this Court observed that the jury might have understood this to refer to a different element of the offense than that referred to in the preceding instructions on the presumption of intent. Alternatively, the jury might simply have understood this instruction to contradict the mandatory presumption which immediately preceded it. Since "[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other . . . the jury was left in a quandary as to whether to follow that instruction or the immediately preceding one its contradicted." 105 S.Ct. at 1975-76. Under either interpretation, this Court was unable to conclude that the instructions could not have operated to shift the burden of proof in violation of the Due Process Clause.

[31] The above instruction was followed by a further instruction, which stated:

> A specific intent to commit the crime charged in this indictment is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury, and is ordinarily ascertained by acts and conduct. Intent may be shown in many ways, provided the jury finds that it existed from the evidence produced before you. It may be inferred from the

dispute that the instruction was defective.[32]

2. The Constitutional Error Was Not Harmless Beyond A Reasonable Doubt.

In *Rose* v. *Clark*, ___ U.S. ___, 106 S.Ct. 3101 (1986), this Court determined that a constitutionally impermissible burden shifting instruction could, under certain circumstances, be harmless error. In making the harmless error determination the Court adopted the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967). *Rose*, 106 S.Ct. at 3107.

Pursuant to *Rose*, a court reviewing the effect of a burden shifting instruction must determine "whether the evidence is so dispositive of intent that [the] reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption" *Id.* at 3109 quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 97, n.5 (Powell, J., dissenting) (1983) *see also*, *Chapman*, *supra*, 386 U.S. at 24. Therefore, in order to render the charge harmless beyond a reasonable doubt, the evidence of intent must be so overwhelming that the reviewing court can conclude that the jury did not rely on the presumption.

---

proven circumstances, or by acts and conduct, or it may be presumed when it is the natural and necessary consequences of the act.

Burger v. *Zant*, 513 F.Supp. 772, 792, (S.D. Ga. 1981). In *Franklin*, this Court determined that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity" because a reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." 105 S.Ct. at 1975.

[32] The divided panel opinion acknowledged that the "jury instruction in this case is virtually identical to the one held unconstitutional in *Franklin*." 785 F.2d at 891.

The majority of the divided panel in this case held that any error in the instruction was harmless because Petitioner did not expressly raise the issue of intent and thus left "uncountered the strong implication of intent which was bound to arise from the evidence presented by the State." 785 F.2d at 892.

A review of the transcript of the guilt/innocence phase of Petitioner's trial discredits the divided panel's conclusion. First, the evidence demonstrated that Petitioner's co-defendant, Stevens, was the planner, instigator and primary actor in the offense.[33] The essence of this line of defense was that although Burger took part in the offense, he did so under the direction and domination of Stevens, and did not have, therefore, the requisite intent.

Petitioner's confession, introduced into evidence at trial (Tr. 278-86), stated that the crime was Stevens' idea. He obtained the weapons and took the money from Honeycutt. Stevens alone sexually assaulted the victim. Burger resisted when Stevens stated that Honeycutt would have to be killed. The State's primary witness, Mr. Botsford, testified that when he asked Stevens and Burger not to kill the victim, Petitioner readily agreed. Botsford was asked:

> Q. In fact, Stevens was the one that was doing all the talking, wasn't he?
>
> A. Most of it.
>
> Q. And Burger was just sorta going along, sorta doing sorta like Stevens was telling him to do, wasn't he?

---

[33] The district court concluded that an examination of the trial record indicated considerable effort to point Stevens as the "chief architect" of the crime. 513 F. Supp. at 795.

A. Sorta.

Q. I think when you said something about turning the cab driver loose, Burger agreed that was the thing that should be done?

A. That's correct. Tr. 111.

It was Stevens who directed Petitioner to drive the cab into the water. After running the taxi into the pond, Burger started to walk away and told Stevens he was leaving. Stevens, however, ordered Petitioner to stay in order to make sure that the car went down.

What the above review of the evidence makes clear is that Petitioner presented considerable evidence that his participation in the crime was under the domination, direction and control of Stevens. Certainly this goes to the issue of intent and the jury may well have relied upon the presumption to have found malice, i.e., that a person is presumed to intend the natural and probable consequences of his acts.

Second, there was evidence in the record that Burger was extremely intoxicated at the time of the offense. The evidence was uncontradicted that he and Stevens had consumed four or five pitchers of beer at a club that evening. They drank until they ran out of money. It was only then that Petitioner agreed to go along with Stevens' plan to rob a taxicab driver. Evidence of intoxication, such as that presented here, goes squarely to the issue of intent. *See Thomas* v. *Kemp*, 766 F.2d 452, 455-6 (11th Cir. 1985), *vacated and remanded*, ___ U.S. ___, 106 S.Ct. 3325 (1986), *on remand*, 800 F.2d 1024 (11th Cir. 1986); *see also*, *Pope* v. *State*, 256 Ga. 196, 345 S.E.2d. 831, 843-4 (1986) (evidence of intoxication may negate intent; State has the burden of proof on the issue).

Under all the circumstances and evidence presented at Petitioner's trial the error was not harmless beyond a reasonable doubt. The burden shifting malice instruction allowed the jury to presume malice on Burger's part as the "natural and probable consequences of his acts" despite substantial record evidence that he was an intoxicated minor acting under the direction of another. The constitutionally deficient instruction in light of the evidence presented at Petitioner's trial compels the conclusion that the State cannot show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman, supra*, 386 U.S. at 23-24.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

JOSEPH M. NURSEY*
MILLARD C. FARMER
P.O. Box 1978
Atlanta, Georgia 30301
(404) 688-8116

JOHN H. BLUME, III
P.O. Box 608
Charleston, SC 29402
Counsel for Petitioner

**Counsel of Record*